No. 20300

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KIDDIE RIDES, INC., a
Colorado Corporation,

Appellant,

vs.

SOUTHLAND ENGINEERING, INC.,
a California corporation,

Appellee.

APPELLEE'S BRIEF

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APPELLEE'S BRIEF

Appellee Southland Engineering, Inc. respectfully files this brief in answer to the contentions made by appellant Kiddie Rides, Inc. in Opening Brief and in support of the findings and judgment of the district court.

This cause grows out of a certain franchise agreement executed by appellant and appellee, whereby appellee agreed to manufacture and appellant to buy a number of coin-in-the-slot

children's horse rides.

Previously, appellant's predecessor franchisee, Palomino Trails Company (not a party to this action), had been franchised by appellee to sell and distribute its rides in four States. Palomino had agreed to buy a minimum of 100 such rides, and to secure this obligation had deposited with appellee the sum of $25,000, under the arrangement that Palomino could recoup this deposit at the rate of $250 for every ride it bought from appellee.

When Palomino had purchased 20 rides, and thus had earned a credit of $5,050 (the extra $50 is not explained by the evidence) it was approached by appellant, who was interested in taking over Palomino's territory and other States under a new franchise agreement with appellee.

As a result of the negotiations between appellant, Palomino and appellee, the Palomino franchise agreement was terminated, and a new franchise agreement, the one at issue herein, which awarded Palomino's four States and others to appellant, was executed between appellant and appellee.

In consideration for the transfer of Palomino's franchise to appellant, appellant paid to Palomino the sum of $19,950, the amount that Palomino still had on deposit with appellee pending Palomino's purchase of the 80 additional rides which it had contracted to buy from appellee.

Then, when appellant and appellee entered into the franchise agreement at issue (in relation to which appellant agreed to buy from appellee 300 rides per year) the parties also expressly agreed that appellant would be given a credit of $250 on each of the first 80 rides which it thereafter bought from appellee -- thus giving appellant the opportunity, by purchasing the entire 80 rides, to earn back the full amount of its payment to Palomino for the latter's franchise rights.

However, appellant never thereafter bought a single ride from appellee.

Ultimately the parties herein mutually terminated their franchise agreement; but subsequently, as is stated in Opening Brief, page 6:

> "After the termination of the Agreement, plaintiff continued to send further correspondence to defendant, requesting a further Franchise Agreement to give plaintiff the opportunity of recovering the deposit of $19, 950."

As a result, appellee executed a letter agreement which provided that appellant would be given a credit of $250 on each ride which it thereafter sold in the States of Texas or Arizona, and which even contained a proviso that appellant would be given a credit of $250 on each ride which appellee itself sold in the two named States. This letter agreement also contained a clause which provided that all of its conditions would terminate as soon

as appellant had earned $20,000 in credit, or in 18 months from the date of the agreement, whichever first occurred.

However, appellant never sold even one ride in Texas or Arizona in the 18 months during which the letter agreement was extant.

(Appellee itself sold three rides in the subject States during that time and stipulated at the trial that appellant was, accordingly, entitled to a credit of $750.)

Subsequently, after the letter agreement had been terminated by the running of its 18 month term, appellant brought suit for the *entire $19,950*.

At the trial, the district court, after reviewing all the documentary and oral evidence relating to the intention of the parties in respect to the franchise agreement; *including the testimony of appellant's own President* (who had negotiated the deal on behalf of appellant) *that he had expressly agreed that the $19,950 credit was to be earned by appellant only by purchasing 80 additional rides at $250 per unit* (which, of course, appellant did not do); made a finding that appellant had never qualified for any credit under the provisions of the agreement (except for the $750 stipulated to) and entered judgment for appellee merely for the $750, with each party to bear its own costs.

In so doing, as will be shown *infra*, under "Discussion", *the district court validly followed the fundamental rule of law*

relating to the construction of a contract which has been established by recognized Federal and California case authority: -- *that the provisions of a contract must be interpreted in accordance with the express intention of the parties at the time they executed the agreement.*

Actually, appellant has not predicated its action for the recovery of the entire $19,500 either on the evidence or on valid and accepted tenets of law; but merely on the contention, apparently based on pure emotion, that appellee has been "unjustly enriched" and that, in "equity and good conscience", appellant should be awarded the full $19,950.

Yet, even assuming, *arguendo*, that sentimental argument can ever be substituted for valid legal principle in any litigation, still at bar there *is no evidence whatever that appellee has actually been unjustly enriched; and, indeed, very substantial evidence that appellee was not* -- including the undisputed evidence that appellee expended the sum of $265,000 for raw materials, labor, engineering, etc., in order to meet its obligation of furnishing appellant and Palomino with the finished rides specified in the franchise agreements -- and thus the district court properly made a finding that no "unjust enrichment" had occurred.

Appellant has urged in Opening Brief that this Court should reverse the judgment herein with directions to the district court that it enter judgment in favor of appellant for the entire

$19,950, as a matter of law; but appellee is confident that on the basis of the actual evidence, this Honorable Court instead will, under Rule 52 (a) of the Federal Rules of Civil Procedure and the case opinions from this Circuit construing that Rule, all cited, *infra*, confirm the findings and judgment of the trier of fact.

STATEMENT OF FACTS AND REVIEW OF THE EVIDENCE

At all times herein at issue appellee was the manufacturer of a certain elaborate coin-in-the-slot children's horse-ride, on which a youngster, after depositing a coin, mounted a saddled model of a pony and rode around a 10-foot oval track, behind corral type fences, for a period of time.

On December 23, 1960, appellee executed a franchise agreement with a certain partnership dba Palomino Trails Company, not a party to this action [Pltf. Exh. 2]. The contract granted Palomino the exclusive right to sell and lease appellee's ride in the States of Texas, Louisiana, Oklahoma and Arkansas.

As consideration for the franchise, Palomino agreed in the contract to purchase 100 such rides from appellee [Finding of Fact 5] at a unit price of $1495, f.o.b. appellee's plant in Santa Monica; and to secure such purchase, Palomino deposited

with appellee the sum of $25,000. In respect to this deposit the contract provided that Palomino would get a reduction of $250 from the purchase price of each of the 100 rides it bought; thus enabling it to recoup the entire deposit when it had purchased the entire 100 [Finding of Fact 5].

Sometime during October 1961 [183:2-3][1], while the Palomino agreement was still in effect (Palomino had by then purchased 20 rides against its commitment of 100) Robert Kohn (appellant's President) negotiated with Harry E. Williams, appellee's President, relative to a different franchise agreement. Kohn and Williams discussed the various States still available and then Kohn stated that he was very anxious to have Texas, because of its favorable weather and suitability for placing appellee's ride outdoors. Williams said that Texas was already committed to Palomino, but suggested that perhaps something could be worked out with Palomino in this respect [184:21 to 185:5].

Thereafter Kohn and Williams met with Scotty G. Harris, one of Palomino's partners, and ultimately Palomino agreed in writing, dated November 15, 1961 [Pl. Exh. 6] to surrender all of its franchise rights and privileges in the States of Texas,

---

[1] All references to the Reporter's Transcript of Proceedings are shown by a number designating the page, followed, after a colon, by the lines included.

Louisiana, Oklahoma and Arkansas.

At that time Palomino, having purchased only 20 rides, had earned only $5,050 against its deposit sum (there is nothing in the evidence explaining the extra $50), leaving a balance in the deposit fund of $19,950 [Finding of Fact 6]; and appellant agreed in the same document to pay this sum directly to Palomino, in return for the opportunity thus made available to appellant to obtain the Texas franchise, as well as those in the other three States, originally committed to Palomino.

On the bottom of the same document Southland acknowledged that it still had on deposit a sum of $19,950, "which shall be credited to the benefit of Kiddie Rides, Inc., a Colorado corporation."

On the same date, November 15, 1961, appellant and appellee executed a new franchise agreement [Pl. Exh. 7] which granted appellant the exclusive "right and franchise to use, sell and otherwise deal with" appellee's rides in 15 states, including Texas and the said other three States, and wherein appellant agreed to buy 300 rides per year, 25 per month, commencing January 1, 1962 [Finding of Fact 8].

The agreement permitted appellant to buy the rides at a lower unit price than had been given to Palomino; and also obligated appellee to pay all the freight charges in shipping the rides to appellant, while Palomino had paid its own freight.

[illegible]

At this time [illegible]

[illegible]

[illegible]

[illegible]

Pertaining to the $19,950 credit sum, unearned by Palomino because of Palomino's failure to purchase the final 80 units for which it had obligated itself, appellant and appellee agreed that appellant's cost for each of the first 80 rides that it thereafter bought from appellee would be reduced by $250; so that when appellant had purchased 80 such rides it would have earned a full credit of $20,000 (or, to be exact, $19,950) [Finding of Fact 7]. In this respect, paragraph 4 of the November 15 franchise agreement provided, inter alia, as follows:

> ". . . Southland hereby agrees that it will give Kiddie a credit of $250 per unit on the first 80 Units (exclusive of the 100 Units heretofore ordered) sold under this Agreement, until the total sum of $19,950 has been credited to Kiddie)."

(The "100 Unit" order referred to involved a separate transaction between the parties, in nowise related to the purchase of the 80 rides specifically enumerated in the instant agreement, whereby appellant had bought and paid for a separate 100 rides.)

Appellant never thereafter purchased a single one of the 80 rides specified in the agreement [86:24 to 87:2; and Opening Brief, p. 6: ". . . plaintiff did not place any further orders"].

Then, in December 1961, President Kohn notified appellee that appellant would not be able to buy any rides, for financial reasons [81:12-15].

By that time appellee had already expended $265,000 for raw materials, labor, tooling, engineering, etc., to make it possible for appellee to manufacture the rides contracted for by appellant and by Palomino [Finding of Fact 14; 91:22 to 92:3; and 94:21 to 95:2].

Subsequently, because appellant had failed to purchase any rides under the franchise agreement, appellee sent to appellant a letter notice of default and termination of agreement [Pltf. Exh. 9], which informed appellant of its default in failing to order rides as provided in the agreement and further stated that if appellant did not cure this default: "the [franchise] agreement will terminate as of March 1, 1962, and thenceforth will be of no force and effect."

On the bottom of this notice, President Kohn, on behalf of appellant, affixed his signature to the following paragraph:

> "KIDDIE RIDES INC. does hereby accept the above notice of default, and does hereby acknowledge that said exclusive Franchise Agreement terminated as of March 1, 1962
>
> Dated March 2, 1962"

"After the termination of the Agreement, plaintiff continued to send further correspondence to defendant, requesting a further Franchise Agreement to give plaintiff the

opportunity of recovering the deposit of $19,950" [Opening Brief, p. 6].

As a result of this correspondence, appellee executed a letter agreement dated May 31, 1962 [Pltf. Exh. 12] which provided appellant with another opportunity to earn full credits against the $19,950 sum, by permitting appellant to sell up to 80 rides in Texas and Arizona, each of which it could purchase from appellee for $250 below the regular price. Moreover, the agreement even specified that appellant would be paid $250 for each ride which appellee itself sold in those two states [Finding of Fact 11]. This agreement concluded with the following paragraph:

> "It being further understood, that said special sales price and remittance will terminate when Southland has remitted to Kiddie Rides, Inc., the sum of $20,000 or the expiration of the period of 18 months, which ever event occurs first."

At the expiration of the 18 month period, December, 1963, appellant had not bought even one ride from appellee; and appellee had sold three in the States provided for [Finding of Fact 12].

Thereafter, on March 2, 1964, appellant filed its Complaint in common count, for "an accounting and for money due and owing", in which it prayed for judgment for the entire

sum of $19, 950.

Trial on the action was held on February 16 and 17, 1965, before the court sitting without a jury, and during the proceedings President Kohn specifically testified, on behalf of appellant, that he had expressly agreed, at the time that the franchise agreement of November 15, 1961 was executed by the parties herein, that the $250 per unit credit provided for in the agreement (to a total of $19, 950 for 80) was only intended to apply against the next 80 rides subsequently to be purchased by appellant (but not one of which appellant ever thereafter bought) [195:1 to 196:18].

At the conclusion of the trial the district court found that: ". . . the plaintiff did not qualify for the credits set out in the November 15, 1961 agreement" [Finding of Fact 9] and gave judgment to appellant only for the sum of $750 -- to which sum counsel for appellee stipulated that appellant was entitled under the May 31, 1962 letter agreement: appellee having sold three rides in Texas during the term of the May 31 agreement [Finding of Fact 12 and Judgment].

Thereafter, appellant gave notice of appeal, contending that it was entitled to recover the full $19, 950 sum, and that therefore the judgment was in error.

DISCUSSION

I

THERE IS OVERWHELMING EVIDENCE, INCLUDING THE TESTIMONY OF APPELLANT'S OWN PRESIDENT, THAT THE PARTIES HEREIN EXPRESSLY CONTRACTED THAT APPELLANT COULD EARN THE $19,950 CREDIT WHICH IS THE SUBJECT OF THIS LITIGATION ONLY BY BUYING 80 ADDITIONAL HORSE-RIDES FROM APPELLEE, AND UNDISPUTED EVIDENCE THAT APPELLANT NEVER BOUGHT EVEN ONE SUCH RIDE. ACCORDINGLY, THE DISTRICT COURT VALIDLY CONSTRUED THE CONTRACT ON THE BASIS OF THE PARTIES' OWN INTENTIONS AND PROPERLY GAVE JUDGMENT TO APPELLEE.

After a thorough and complete trial on the merits, the district court found that appellant is not entitled to recover the sum of $19,950 for which appellant sued appellee (and only the $750 stipulated to by appellee) because the parties themselves had contracted that the larger sum could only be earned by appellant by the purchase from appellee of 80 additional children's rides (at the rate of $250 per ride), and appellant never purchased any of these rides.

And there is substantial, actually overwhelming, evidence, both oral and documentary, in support of this finding and the ensuing judgment that appellant take only the stipulated to $750.

[illegible]

I

[illegible]

[illegible]

[illegible]

Harry E. Williams, appellee's president, testified as follows [118:16 to 119:6]:

> "The Witness: My understanding of the whole thing was that the deposit was put up by Palomino Trails prior to my taking over the company on a firm order of 100 machines. Mr. Kohn [appellant's president] negotiated for 100 machines separate from Palomino, it had nothing to do with Palomino Trails. It was a separate transaction. Subsequently he wanted Texas and he negotiated with Palomino Trails to take Texas, and I assume the same thing he did, that he was taking over Palomino Trails' position and that position clearly stated and my understanding clearly was that it was to get the refund of $250.00 per machine on a $1,495.00 machine and had nothing to do with the new price I gave him on his 100 machines.
>
> "The Court: All right.
>
> "The Witness: That is my understanding of the whole thing. Had he purchased the other 80 machines he would have received his $250.00 deposit [on each]."

Indeed, Robert Kohn, appellant's own president, himself testified that the parties had agreed to apply the

$19,950 "deposit" against machines purchased after the initial 100; as follows [195:1 to 196:18]:

> "The Witness: Now, the last conversation then was in Mr. Williams' office between Mr. Williams and myself, where he stated: '. . .why don't you be a good guy and why don't you agree to recoup or recover this credit on horses purchased after the first 100 horses and not on your original purchase [of 100]. . .?'
>
> "I don't know why the hell I did it --
>
> "Q. Don't comment on it. A. Pardon me sir.
>
> "Q. Just say what was said. A. But I agreed.
>
> "Q. You agreed? A. I agreed. I agreed with Mr. Williams at that point, because we were all thinking, Mr. Williams was thinking, I was thinking that the purchases would run two, three, four hundred ***
>
> "And as I pointed out, the very last conversation just before I left was I agreed that we wouldn't demand the return of our deposit, this advance deposit which was to be credited to us until purchases after the first 100, and the contracts were so drafted."

And the actual agreement executed by the parties on November 15, 1961 [Pltf. Exh. 7] contains the following language in Paragraph 4:

> ". . . Southland hereby agrees that it will give Kiddie a credit of $250.00 per Unit on the first 80 Units (exclusive of the 100 Units heretofore ordered) sold under this Agreement, until the total sum of $19,950 has been credited to Kiddie . . . "

Other evidence further showed that later; after appellant had committed an anticipatory breach of the foregoing agreement, by notice to appellee that appellant did not intend to purchase the other 80 rides, and the parties had mutually terminated the agreement in writing by a document dated February 1, 1962; appellant again desired an opportunity to earn the $250 credit against 80 additional units.[2]

---

[2] As appellant itself describes this situation in its Opening Brief, page 6:

> "After the termination of the Agreement, plaintiff continued to send further correspondence to defendant, requesting a further Franchise Agreement to give plaintiff the opportunity of recovering the deposit of $19,950." (Emphasis added.)

Then the parties mutually agreed, by a letter dated May 31, 1962, that appellant would get such a $250 credit against 80 rides, either by purchasing them outright at a price reduced by $250 per unit, or from sales of such rides by appellee itself in the States of Texas and Arizona. The letter, [Pltf. Exh. 13] executed by appellee's president Williams, provided as follows:

> "Southland hereby grants to Kiddie Rides, Inc., for a period of 18 months a special sale price of $1245.00 per unit for the next 80 units of Western Trails Traveling Pony sold in the States of Texas and/or Arizona.
>
> "In the event that Southland makes any sales of Western Trails Traveling Pony Units, other than to Kiddie Rides, Inc. in the States of Texas or Arizona during said 18 month period, it will remit to Kiddie Rides, Inc. the sum of $250.00 per unit or the difference between its selling price and $1245.00, whichever is the greater. Sales taxes and freight charges are not to be included in the above calculations.
>
> "It being further understood, that said special sales price and remittance will terminate when Southland has remitted to Kiddie Rides, Inc. the sum of $20,000.00 or the expiration of the period of 18 months, which ever event occurs first."

[illegible]

> [illegible]

> [illegible]

> [illegible]

The evidence is undisputed that when the 18 month period provided in this supplemental agreement had run (and the agreement thus terminated) appellant itself had not purchased a single ride and appellee had sold three in Texas -- thus entitling appellant to the credit of $750 stipulated to, but no more.

It is settled law, by both Federal and California case authority, that a court, in construing a contract between litigating parties, is obliged to determine the actual intention of the parties when they executed the agreement and to give credence to this intention.

On the basis of the foregoing evidence clearly establishing that the parties herein intended by their agreement that appellant was to earn credits against the $19, 950 sum only by purchasing additional rides -- which evidence includes the testimony of appellant's own president -- and on the undisputed evidence that appellant never then bought even one such ride -- it is manifest that the findings and judgment of the district court are entirely correct and proper; and it is likewise patently evident that if the court *had* ruled as appellant is contending it should have: - that appellant may recover the $19, 950 without having purchased the additional rides -- this would fly squarely in the face of the parties' own express agreement and would be erroneous under law.

In *the Harriman v. Emerick*, 76 U.S. 1, 19 L.Ed. 629, the Supreme Court said, at page 633:

> ". . . It is the province of courts to enforce contracts - not to make or modify them."

And in Sterneck v. Equitable Life Ins. Co. of Iowa, 237 F.2d 626 (8 Circ. 1956) it is said, at page 629:

> ". . . A contract that is plain and unmistakable in its terms may not be rewritten by a court to conform to what one of the parties may have thought the contract ought to be."

Also in accord: Hood v. James, 256 F.2d 895, (5 Cir. 1958) at page 903.

Similarly, under California law, see Harris v. Spinali Auto Sales, Inc., 202 Cal.App.2d 215 (1962), wherein it is said, in reviewing the role of a court in construing a contract, at pages 219, 220:

> "It is not the province of the court to add to the provisions thereof; to insert a term not found therein; or to make a new stipulation for the parties (Many citations)."

And in Construction Machinery Co. v. Willard & Rodman, Inc., 208 Cal.App.2d 31 (1962) it is said at page 38:

> "'It is not the province of the court to alter a contract by construction, or to make a new contract for the parties, nor can the court rewrite the clear terms of a lawful contract' (Many citations)."

II

THERE IS NO EVIDENCE WHATEVER TO SUPPORT APPELLANT'S BARE ARGUMENT THAT APPELLEE WAS "UNJUSTLY ENRICHED" BY THE TRANSACTION AT ISSUE AND OVERWHELMING AND UNCONTROVERTED EVIDENCE IN SUPPORT OF THE FINDING OF THE DISTRICT COURT THAT NO UNJUST ENRICHMENT HAS OCCURRED.

Now, in Opening Brief, appellant blithely ignores all of the foregoing-cited material evidence relating to the parties' actual intention, which thus substantiates the findings of fact and judgment, and vigorously urges, nevertheless, that the judgment should be reversed by this Honorable Court, with directions to the district court to enter judgment in appellant's favor for the entire $19,950. [Op.Br. p. 29].

Indeed, appellant's entire 30 page brief appears to be filled, not with any argument on the merits, but only with impassioned allusions to "equity and good conscience" and "unjust enrichment". Thus the brief appears to be motivated merely by the bare hope that this Court will "feel sorry" for appellant; and thereby will be persuaded to ignore the evidence, and the determination by the trier of fact, and to award appellant the $19,950, de novo, as a matter of law.

It is not to be anticipated, however, that this Court will be so swayed. The Court can take judicial notice that in the United States, in recent years, thousands of business franchises

and exclusive sales contracts have been executed, wherein the franchiser collects from the franchisee a large and substantial franchise fee, which immediately thereafter belongs to the franchiser outright and is not returnable at all; even if, unlike the situation at bar, the franchisee does continue to make substantial purchases of the franchiser's goods.

At bar, appellee granted to appellant a valuable and "exclusive franchise and license to use, sell, merchandise and otherwise deal" with its rides in 15 Western, Midwestern and Southern States, on extremely favorable terms: appellant's cost per ride was $45 less than Palomino had paid; and on sales to appellant, appellee paid the freight charges to their destination, while Palomino had been required to pay the freight charges from appellee's plant in Santa Monica; and yet, appellee still gave appellant the opportunity to recover the full sum of $19,950 -- not one penny of which appellee had ever actually received from appellant -- by buying only 80 additional rides. And appellant, not appellee, ultimately defaulted on the franchise agreement.

Clearly, there is nothing reprehensible, unconscionable or unjust about an arrangement whereby a franchisee is required to make a certain number of purchases of the franchiser's product in order to receive a monetary credit against a sum on deposit; particularly when, as is here admitted by appellant, the franchisee accepted the deal with its eyes open, in an

at-arms-length transaction.

In the booklet, Lewis, The Franchise System of Distribution, the author, in discussing the various business franchising procedures prevalent in America today, tells about the many transactions wherein the franchiser collects a substantial franchise fee which is entirely non-returnable; and then also discusses an arrangement very similar to the one undertaken by the parties herein, which is used by one nationally known franchiser; as follows at page 30:

> ". . . The franchise fee to be paid is stated in the agreement. If the contractor meets the yearly quota, however, one third of the franchise fee is credited to the contractor to be applied against future purchases. This practice is followed for each of the first three years of the franchise. If the franchisee meets his quota in each of these years he is credited for the full franchise fee." (Emphasis added.)

Moreover, the contention that appellee has been unjustly enriched flies squarely in the face of the undisputed evidence that as a result of the franchise agreements with Palomino and with appellant, appellee expended the sum of $265,000 for raw materials, labor, tooling, engineering, etc.

[illegible]

[illegible]

> [illegible]

[illegible]

Witness Williams testified as follows:

> "Q. So that by November 15, 1961, the Southland Engineering had invested approximately $265,000 for engineering? A. $265,000.
>
> "Q. For prototype and for developing its production line. A. That is correct.
>
> [91:22 to 92:3]
>
> * * *
>
> "Q. In other words, Southland Engineering then pursuant to this agreement wherein it received a deposit, provided raw materials, labor, place of business and spent a substantial amount of money in making itself ready, willing and able to provide under the terms of this contract these units, is that correct? A. That is correct."
>
> [94:21 to 95:2].

The district court filed Finding of Fact 14, which alludes to appellee's $265,000 investment on the strength of the franchise agreements at issue, and appellant has made no objection to this finding on appeal. The finding reads as follows:

> "14. Defendant at all times during the period from December, 1960 to December, 1963, and during all of the times hereinabove mentioned was ready, willing and able to perform

> its obligations under any and all of the several agreements hereinabove mentioned, and in order to be ready, willing and able to so perform its obligations under said agreements and other agreements, the defendant did during said period expend the sum of $265,000.00 in setting up its plant and other facilities."

The district court also filed Conclusion of Law 3, which reads as follows:

> "Defendant is not unjustly enriched in failing to give plaintiff any portion of said credit other than the said $750.00 and *plaintiff has failed to prove that the remainder of said credit exceeds the damage caused to the defendant.*"
>
> (Emphasis added)

Again, *appellant makes no contention in Opening Brief that this conclusion does not properly reflect the evidence heard by the court:* -- relating to appellee's expenditure of $265,000 in order to meet its obligations under the franchise agreements. *Nor does appellant urge on appeal that it itself offered any evidence whatever to rebut or refute this evidence by appellee.*

And, indeed, appellee proffered no such evidence. Instead, appellant limits its attack on the conclusion of law in question solely to the argument in its brief, pages 22-28, that the trial court improperly relied upon, as authority for this

conclusion, the cases of Major-Blakeney Corp. v. Jenkins, 121 Cal.App.2d 325, and Baffa v. Johnson, 35 Cal.2d 36.

Says appellant in its brief, page 25:

> "Clearly, the two cases are not authority for the instant litigation."

Now, for appellant to urge that someone else has relied on case opinions which are not in point is truly a masterpiece of irony, in light of the fact that, as will be shown, infra, appellant has not cited a single case in its entire brief, of the many therein named, which has even a remote relationship to the factual issues at bar.

But, in any event, it is obvious that the district court has properly relied on the Major-Blakeney and Baffa cases for the rule that a plaintiff who alleges the forfeiture of a certain sum paid by him to a defendant has the burden of proving that the defendant, while retaining the sum paid, has actually not suffered at least an equal monetary loss as a result of the entire transaction.

Indeed, appellant concedes this in its brief, saying at pages 24, 25:

> "In Baffa v. Johnson *** As in the Mayor-Blakeney case ... the Supreme Court denied the return of the $5,000 down payment because plaintiff failed to prove that defendants' damages were less than the amount paid." (Emphasis

added)

See, also, Roebling v. Dillon, 288 F.2d 386 (D.C. Circ. 1961), wherein a defendant's judgment was affirmed and the Court said, at page 387:

> ". . . in order for plaintiff to establish unjust enrichment the benefit must be shown to have been unjustly retained. Bailis v. Reconstruction Finance Corp., 3 Cir., 1942, 128 F.2d 857. We do not think plaintiff has shown this."

The two cases cited by appellant on the issue of "unjust enrichment" are not even remotely related to the factual matters at bar, have nothing whatever to do with rights under an executed franchise agreement, and are patently not in point herein:

Rodriguez v. Barnett, 52 Cal.2d 154, is an action for the rescission of an executory land purchase agreement and for the return of a deposit; and

Gonzalez v. Hirose, 33 Cal.2d 213, is a quiet title action.

III

ACCORDINGLY, THE FINDINGS AND JUDGMENT OF THE DISTRICT COURT, SUPPORTED BY VERY SUBSTANTIAL EVIDENCE, SHOULD BE AFFIRMED ON APPEAL.

Appellee is entirely confident that on the basis of the actual evidence, as hereinbefore reviewed, this Court will disregard appellant's appeal to pure emotion, and will affirm the findings and judgment of the trier of fact on the merits.

In Overman v. Loesser, 205 F.2d 521 (9 Circ. 1953) this Court said, in affirming a defense judgment, at page 522:

> "Ordinarily, where there is a dispute as to fact which must be resolved from the conflicting testimony of witnesses, the findings, of the trial judge who had the opportunity to observe the demeanor of the testifying witnesses and thus to judge their credibility, are conclusive upon appeal unless clearly erroneous. Rule 52(a) Federal Rules of Civil Procedure, 28 U.S.C.A.; United States v. United States Gypsum Co., 33 U.S. 364, 294, 68 S.Ct. 525, 92 L.Ed. 746."

And in Distillers Distributing Corporation v. J. C. Millett Co., 310 F.2d 162 (9 Circ. 1962), a breach of contract action between a manufacturer and a distributor of the

manufacturer's product, this Court said in affirming a judgment, at page 163:

> "In this appeal appellant asserts that the evidence is insufficient to support the findings. Taking up the first cause of action, we find that the trial court had before it in support of its judgment the following evidence: (etc.) * * *
>
> "There was evidence to the contrary but the trial court evidently credited the testimony of Lewis. Such was its province and we could not disturb its findings in that respect unless the evidence could be said to be so inherently improbable as not to be worthy of belief, which it was not. Lewis' testimony was substantial and sustains the finding of the trial court."
>
> (Emphasis added).

Also in accord: Reynolds v. Royal Mail Lines, 254 F.2d 55 (9 Cir. 1958) at page 57.

Under the discussion relating to the issue of "unjust enrichment" appellee pointed out that the cases cited by appellant in Opening Brief (under "Argument IV C and IV D") purportedly in support of appellant's position on this issue, were not in point with the cause at bar.

It is equally true that all the many other cases cited by appellant in its brief are similarly nowise in point. (Interestingly, there is not a single Federal case opinion cited in appellant's entire brief):

Under "Argument IV A", Opening Brief, pages 10-13, the following six cases are cited:

Mahony v. Standard Gas Engine Co., 187 Cal. 399 (1929)- an action between a buyer and seller of a chattel, wherein it was held that the buyer had the legal right to rescind the sales contract and have his deposit returned, when the seller furnished a grossly defective chattel.

Lubeck's Investment Co. v. Voris, 68 Cal.App. 652 (1924) - an action to recover a deposit given on real property after the buyer and seller had agreed to rescind the agreement, and to recover money retained by a real estate broker as commission for arranging the conveyance.

Philpott v. Superior Court, 1 Cal.2d 512 (1934) - a proceeding in prohibition to restrain the Superior Court of Los Angeles County from dismissing an action for want of jurisdiction. Writ denied.

Long-Way v. Newberry, 13 Cal.2d 603 (1939) - an action based on a fraudulent conveyance of real property.

Fontaine v. Lacassie, 36 Cal.App. 175 (1918) - an action for rescission of a contract between a mother and daughter-in-law, wherein the older woman gave the younger some money on

the latter's broken promise to make a home available to the oldster for life.

Briggs v. Marcus-Lesoine, Inc., 3 Cal. App. 2d 207 (1934) - an action between a manufacturer and his agent for the recovery of commission money retained by the principal (and allegedly paid out to others) without the authority of the agent.

And under "Argument IV B", pages 13-19, appellant cites eleven cases; none, likewise, in point; as follows:

Keller v. Hicks, 22 Cal. 457 (1863) - involves the assignment of an illegal County warrant.

Bennett v. Superior Court, 218 Cal. 153 (1933) - concerns a Petition for a Writ of Prohibition to restrain the Superior Court from discharging an attachment.

Cherry v. Hayden, 100 Cal. App. 2d 416 (1950) - an action against an architect for the repayment of money deposited with him, under the architect's express written promise to return the money.

Van Hoosen v. Briscoe, 85 Cal. App. 746 (1927) - a suit for the return of a deposit on real property, made during a preliminary oral discussion, when no contract was ever executed by the parties.

Grant v. Long, 33 Cal. App. 2d 725 (1939) - a declaratory relief action, seeking a declaration by a widow

plaintiff as to what rights were to be granted to her in respect to a life tenancy in a hotel owned by the defendant, by reason of the plaintiff's husband's investment in the corporation during his lifetime.

Jennings v. Bank of California, 79 Cal. 323 (1889) - an action for damages for refusal of the defendant to transfer certain of its stock to plaintiff.

Dunham-Carrigan-Hayden Co. v. Rubber Co., 84 Cal. App. 669 (1927) - an action between a tire manufacturer and a distributor of the tires, compelling the manufacturer to take back unsold tires which the distributor had paid for, but which he had the power to return under the contract between the parties.

Smith v. Moynihan, 44 Cal. 53 (1872) - a suit against a partnership for the value of labor performed and materials furnished.

H. S. Crocker Company, Inc. v. McFaddin, 148 Cal. App. 2d 639 (1957) - a claim and delivery action for abandoned Christmas cards.

Rankin v. Miller, 179 Cal. App. 2d 133 (1960) - a suit by a broker for a commission for the sale of real property.

CONCLUSION

For the foregoing reasons, appellee respectfully urges that the judgment herein should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, Abe Mutchnik, one of the attorneys for the above named appellee, Southland Engineering, Inc., a California corporation, do hereby certify that I have examined the provisions of Rules 18 and 19 of the above entitled Court, and that in my opinion the tendered brief on behalf of Southland Engineering, Inc. conforms to all requirements.

/s/ Abe Mutchnik
ABE MUTCHNIK